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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

No. 322

ROSCOE HERGET, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Bankrupt,

Petitioner,

vs.

THE CENTRAL NATIONAL BANK & TRUST COMPANY OF PEORIA, a National Banking Corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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BRIEF FOR RESPONDENT IN OPPOSITION.

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 20) is reported at 141 F. (2d) 150.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered February 5, 1944 (R. 23), and a petition for rehearing was denied April 5, 1944 (R. 31). The petition for a

writ of certiorari was filed August 5, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See Rule 38 (2) of this Court regarding the time for filing petition.

The petition for writ of certiorari was filed out of time because it was filed more than three months after the date of the denial by the Circuit Court of Appeals of the petition for rehearing.

Sec. 350 Title 28 U. S. C. A.

Kennedy Realty Corp. v. *City of New York*, 319 U. S. 750, 87 L. Ed. 1705.

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New York Central Railroad Co. v. *Middleport Gas & Electric Light Co.*, 260 U. S. 724, 67 L. Ed. 483.

The order of June 10, 1944 (R. 34) for the extension of time for filing petition for writ of certiorari is invalid because it does not affirmatively show that such extension was "for good cause shown" (Sec. 350 U. S. C. A. Title 28).

The power granted by said Section 350 to extend the jurisdictional period for filing a petition for writ of certiorari in this Court is exercisable by a Justice thereof only upon compliance with the condition imposed by said Section, namely, "for good cause shown."

The nature and limits of the judicial power of the United States are such as to require this Court of its own motion, to deny its own jurisdiction, in cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act.

Mansfield etc. v. *Swan*, 111 U. S. 379, at 382.

The requirement that the record affirmatively show that this Court has jurisdiction of a petition for writ of certiorari filed after the expiration of the three months period prescribed by statute for the filing thereof, precludes indulging in any inference that "good cause" was shown for the extension of time to file such petition.

Since the record in this case fails affirmatively to show by recital or finding in the order of extension, or otherwise, that such order entered on the *ex parte* application of counsel for petitioner was "for good cause shown," it would seem necessarily to follow that such order is invalid.

For forms of motion to extend and the order extending time for filing petition for writ of certiorari, *affirmatively* showing "good cause" for such extension, see pp. 14 and 15 "Appellate Practice and Procedure in Supreme Court of United States" by Reynolds Robertson.

Questions Presented.

(1) Whether an action to recover a voidable preference under Section 60b of the bankruptcy act is barred by the limitation prescribed by section 11e of the same act after two years from the date of adjudication.

(2) Whether any further time is allowed by section 11e for the institution of any suit on a cause of action created by the bankruptcy act since said section allows such fur-

ther time only where applicable federal or state laws so permit.

(3) Whether the further time referred to in said section 11e applies only to causes of action arising under federal non-bankruptcy laws or under state laws and not to causes of action created by the bankruptcy act itself.

Statement.

Petitioner, a trustee in bankruptcy brought this suit in the District Court to recover from respondent certain alleged voidable preferences. Petitioner's complaint was dismissed on respondent's motion on the ground that the suit was brought more than two years after the date of adjudication in bankruptcy (i. e. 38 days short of five years from that date), and that under section 11e of the Chandler Act, the action was barred. The Circuit Court of Appeals affirmed the judgment of the District Court.

Statutes Involved.

Subsection 11e of the Bankruptcy Act, added by the Chandler Act, June 22, 1938, c. 575, sec. 1, 52 Stat. 840, 849 (11 U.S.C. sec. 29e) provides:

> A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. • • •

The Illinois Statute of Limitations (Ill. Rev. Stats. (State Bar ed. 1943) c. 83) provides:

Sec. 12. The following actions can only be commenced within the periods hereinafter prescribed, *except when a different limitation is prescribed by statute.*

Sec. 13. Actions for slander or libel shall be commenced within one year next after the cause of action accrued.

Sec. 14. Actions for damages for an injury to the person, or for false imprisonment, or malicious prosecution, or for a statutory penalty, or for abduction or for seduction, or for criminal conversation, shall be commenced within two years after the cause of action accrued.

Sec. 15. Actions on unwritten contracts, express or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and *all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued.* (Emphasis supplied)

Summary of Argument.

1. Section 11e of the Chandler Act bars the instant action because it was not brought within two years from the date of the adjudication in bankruptcy on April 11, 1938.

2. Section 11e bars suits to set aside and recover alleged voidable preferences unless the same are brought within two years from the date of adjudication. In so doing section 11e codifies the unanimous holdings of the courts construing section 11d of the Bankruptcy Act of 1898 to the effect that the limitation provision set forth in that act, to the exclusion of any other statute of limitations whatsoever, state or federal, applied to such suits.

3. The decisions under the 1898 Act were in substantial conflict with respect to the question whether state and non-bankruptcy statutes of limitation applied to causes of action inherited by the trustee from the bankrupt or his creditors, in contrast to causes of action to set aside and recover preferences which were created and vested in the trustee by the Bankruptcy Act itself.

4. Some of the decisions held that section 11d of the Act of 1898 controlled with respect to such inherited causes of action and other decisions held that state and federal non-bankruptcy statutes of limitation controlled with respect to those causes of action. Nevertheless, the opinions of the courts on both sides of that question repeatedly pointed out that a cause of action to set aside a voidable preference was governed exclusively by the limitation provision of the Bankruptcy Act itself.

5. All of the authorities held that suits brought by the trustee to set aside and recover voidable preferences are created by the Bankruptcy Act and are governed solely by the limitation provision contained in that Act and not by any state statute of limitations.

6. By providing in section 11e of the Chandler Act that the trustee should have two years from the date of adjudication in which to bring suits, Congress clearly indicated its intention to cut down the time for the commencement of such suits and to retain, as to such suits, a special and *exclusive* limitation statute.

7. Suits to set aside alleged voidable preferences are barred by section 11e unless brought within two years from the date of adjudication since there is no state or other federal limitation law applicable thereto.

ARGUMENT.

1. It is conceded by both petitioner and respondent that the proper limitation period applicable to the suit brought by petitioner in the District Court to recover alleged voidable preferences is determinable solely from section 11e of the Bankruptcy Act.

Respondent contended in the District Court and in the Circuit Court of Appeals that the trustee's suit to recover such preferences was barred after two years from the date of the adjudication. This contention was sustained by both such courts, based on the fact that the cause of action sued on was created by the Bankruptcy Act and did not arise under any federal *non*-bankruptcy or state law (Rec. 10). Petitioner's contention here is, as it was in those courts, that the catch-all provision of section 15 of the Limitations Act of Illinois permitted the bringing of such action within five years from the accrual of the cause of action. Such contention is asserted notwithstanding that by the express terms of section 12 of the Illinois Act such catch-all provision does not apply when a different limitation is prescribed by statute (*supra* p. 5). Petitioner's theory is that section 11e has adopted said section 15 of the Illinois Act by reference. (Specification No. 2, page 5). Our position is that section 11e has not adopted said section 15 of the Illinois Act by reference, as to causes of action created by the Bankruptcy Act. We contend that section 11e prescribes a two year period of limitation from the date of adjudication, and only if the cause of action sued on arises under a federal non-bankruptcy law (such as the Federal Securities Act) or under state law, then and only then, suit

may be brought within such further time as is permitted by the applicable federal or state law.

If our position, as thus stated, is correct then the Illinois Limitations Act is not involved at all since the cause of action, set forth in the complaint of petitioner, does not arise under any non-bankruptcy federal or state law but under the Bankruptcy Act which creates it. Hence no state law could possibly permit any further time than the two years from the date of adjudication, allowed by section 11e of the Bankruptcy Act, because such state law is not *applicable* to such cause of action.

Irrespective, however, of whether or not such adoption has occurred, as petitioner contends, there remains only the question of what is the Illinois law.

One of the judges of the court, whose decision is sought to be reviewed here, had long experience in the jurisprudence of the state of Illinois. This Court will ordinarily accept, and therefore will not review, save in exceptional cases, the considered determination of such question of state law by the Circuit Court of Appeals.

> *Huddlestone* v. *Dwyer*, 88 L. Ed. 933, at p. 936.
> *Helvering* v. *Stuart*, 317 U. S. 154 at p. 163; 87 L. Ed. 154 at p. 160.

This is not an exceptional case inviting a review by this Court, since the state statute of limitations clearly shows upon its face that the catch-all clause relied on by petitioner has no application when a different limitation period is prescribed by statute, such as is the case here.

Another reason why this is not an exceptional case is because the Supreme Court of Illinois has held in *Handtoffski* v. *Chicago Union Traction Co.*, 274 Ill. 282 at p. 286, that the catch-all limitation in section 15 of the Illinois Limitations Act does not apply when a different limitation is

prescribed by a federal statute. There is no Illinois case holding to the contrary, and none is cited by petitioner.

2. The decision of the court below follows the plain language of the statute involved. The exact language of section 11e of the Chandler Act is:

> "A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. * * *" (Sec. 29 (d) Title 11 U. S. C. A.)

The above section codifies the unanimous holdings of the courts construing section 11d of the Bankruptcy Act of 1898 to the effect that the limitation provision set forth in that Act, to the exclusion of any other statute of limitations whatsoever, state or federal, applied thereto. Since this case involves a suit by a trustee in bankruptcy to set aside alleged voidable preferences, the fundamental question is the proper construction of section 11e, as applied to a suit to enforce such a cause of action by the trustee. The petition for certiorari (p. 18) sets forth the sole comment in the Committee Report to the House of Representatives with respect to the Chandler Act which was made with reference to section 11e and which consists in substance merely of a restatement of the provision itself.

It is observed from this fact that the Committee was not of the opinion that it was proposing a radically new piece of legislation which required extensive discussion because of the change to be made in the existing law. As an examination of the decisions of the courts construing the limitation provision contained in section 11d of the Bankruptcy Act of 1898 will disclose, a proper construction of

section 11e of the Chandler Act demonstrates that it made no substantial change in the existing law, with respect to the *exclusiveness* of the limitation provision therein. It merely set at rest certain conflicts in the decisions interpreting section 11d.

Section 11d of the Act of 1898 provided as follows:

> "Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed." (Sec. 29(d), USCA.)

The decisions hereinafter referred to applying and construing this provision disclose, that the courts were unanimous in holding that the limitation provisions of section 11d of the Act of 1898 were the sole measure of the time within which actions were required to be brought by the trustee to set aside alleged preferences, and no period of limitation contained either in any state law or in any other federal statute could properly be applied to such a proceeding. To interpret section 11e of the Chandler Act to impose a period of limitation of two years from the date of adjudication on the bringing of such an action by the trustee, without regard to the provisions of any state or other federal law relating to the time within which actions may be brought, codifies this unanimous result reached by the decisions construing section 11d of the Act of 1898. It is our contention that such is the only proper interpretation of section 11e of the Chandler Act, and that such interpretation sustains the judgments below and defeats the instant action, which was not brought until almost five years after the date of adjudication herein.

The decisions under the 1898 Act were in substantial conflict with respect to the question whether state and non-bankruptcy federal statutes of limitation apply to causes of action, inherited by the trustee from the bankrupt or his creditors, in contrast to causes of action to set aside and recover preferences which were created and vested in the trus-

tee by the Bankruptcy Act itself. Some of the decisions held that section 11d of the Act of 1898 controlled with respect to such inherited causes of action and other decisions held that state and federal non-bankruptcy statutes of limitation controlled with respect to those causes of action. Nevertheless, the opinions of the courts on *both* sides of that question repeatedly pointed out that a cause of action to set aside a voidable preference was governed exclusively by the limitation provision of the Bankruptcy Act itself.

A typical case, in which the cause of action was inherited by the trustee from creditors, and which was held governed by the state statute of limitations, is *Davis* v. *Willey*, 273 Fed. 397. That was an action by a trustee in bankruptcy under section 70e of the Bankruptcy Act to recover sums transferred to the defendant by the bankrupt and alleged to have been transferred in fraud of creditors. The trial court held as a conclusion of law that the action was barred by the California statute of limitations, which provided a period of three years. The Circuit Court of Appeals for the Ninth Circuit, affirming the decree of the trial court for the defendant, held that the state statute of limitations controlled and that the limitation period in the Bankruptcy Act for the institution of suits by a trustee in bankruptcy did not control.

Harrigan v. *Bergdoll*, 270 U. S. 560, 70 L. Ed. 733, was a trustee's action, as successor to the bankrupt, against a stockholder of the bankrupt corporation on account of unpaid stock subscriptions. This Court in that case held that the state statute of limitations applied and that the Bankruptcy law did not modify the right of action against the stockholder or create a new one.

Another line of cases supported the proposition that suits brought by trustees in bankruptcy on causes of action inherited by them, both from the bankrupt and from

creditors of the bankrupt, were governed by the limitation provision contained in section 11d of the Bankruptcy Act, and *not by state statutes of limitation.* Typical of this line of cases is *Isaacs* v. *Neece*, 75 Fed. (2d) 566. That was a suit brought by a trustee in bankruptcy under section 70e of the Bankruptcy Act against preferred stockholders of the bankrupt to cancel and set aside as fraudulent, and to recover back, payments the bankrupt had made to them in redemption of their stock. The theory of the suit was that the trustee was suing *as successor* to the rights of creditors of the bankrupt. The defendant relied upon the *state* statute of limitations as a bar to the suit. The Circuit Court of Appeals, held that the state statute of limitations did *not* apply, but *that the limitation period contained in section 11d of the bankruptcy act did,* and superseded all state statutes of limitation in suits brought by trustees in bankruptcy to recover on any cause of action.

Some subsequent cases followed those first referred to above, which held that actions not based upon and created by the Bankruptcy Act were governed by state statutes of limitation, and not by section 11d of the Bankruptcy Act of 1898. See *Silverman* v. *Christian*, 123 N. J. Eq. 506; 198 Atl. 832 and annotation in 82 A.L.R. 816. The *Silverman* case cited with approval both *Davis* v. *Willey, supra,* and *Harrigan* v. *Bergdoll, supra,* and criticized *Isaacs* v. *Neece, supra.* Other subsequent cases such as *Engebretson* v. *West, et al.*, 133 Nebr. 846; 277 N.W. 433, on the other hand, made the same holding as the Circuit Court of Appeals of the Fifth Circuit did in *Isaacs* v. *Neece.* This confllict, in cases not involving suits to recover voidable preferences, as to state versus the bankruptcy act limitation provision continued to rage until the passage of the Chandler Act.

No conflict existed prior to the passage of the Chandler Act in the cases involving causes of action created by

Section 60b for the recovery of voidable preferences. The cases uniformly held that state statutes of limitation did not apply to such causes of action, but that they were governed by old section 11d.

The Circuit Court of Appeals for the Ninth Circuit, which is the same court that had decided the case of *Davis* v. *Willey*, 273 Fed. 397, held in the case of *Meikle* v. *Drain*, 69 Fed. (2d) 290, that the limitation provision contained in section 11d of the Bankruptcy Act, and *not the state statute of limitations*, applied to a trustee's suit to set aside a voidable preference based on section 60b of the bankruptcy act.

Another case, applying the rule announced in the case of *Meikle* v. *Drain*, 69 Fed. (2nd) 290, to a suit brought by the trustee to recover voidable preferences under section 60b of the bankruptcy act, is *Arnold Grocery Co.* v. *Shackelford*, 140 Ga. 585, 79 S.E. 470. In that case the court held that the limitation provision contained in section 11d of the bankruptcy act governed actions brought by the trustee for the recovery of voidable preferences under section 60b of the bankruptcy act of 1898.

With this background of decisional law Congress enacted section 11e of the Chandler Act.

The above cases demonstrate that Congress by section 11e of the Chandler Act codified its concurrence that the limitation provision contained in the Bankruptcy Act exclusively governed suits by the trustee to set aside voidable preferences, and provided a period of two years subsequent to the date of adjudication to govern them.

Congress has also by section 11e preserved part of the rule expressed in *Davis* v. *Willey*, 273 Fed. 397, and *Harrigan* v. *Bergdoll*, 270 U. S. 560, namely, that causes of action inherited by the trustee in bankruptcy from the debtor and from his creditors are to be governed by the

limitation period prescribed by the applicable state or federal law, other than the Bankruptcy Act, but fixed a two year limitation period, in any event, for bringing suit to enforce a cause of action not outlawed when the petition in bankruptcy was filed.

The reasons assigned by the foregoing cases for their holding that old section 11d exclusively applied to causes of action created by the Bankruptcy Act apply with equal force to section 11e of the Chandler Act.

By providing in section 11e of the Chandler Act that the trustee should have two years from the date of adjudication within which to bring suits, Congress clearly indicated its intention to cut down the time for the commencement of such suits and to retain as to such suits a special and *exclusive* limitation statute. When so providing in section 11e, Congress undoubtedly had before it section 8 of the bankruptcy act of 1841 as well as section 2 of the bankruptcy act of 1867, both of which prescribed a two year limitation period.

(Vol. 9, Collier on Bankruptcy, 14th Ed., pp. 1743-1747.)

The reason for fixing such a short period of limitation in the acts of 1841 and 1867, was pointed out in the case of *Bailey* v. *Glover*, 21 Wall. 342, where the court said (88 U. S. 342 at 346):

> "It is obviously one of the purposes of the Bankrupt Law, that there should be a speedy disposition of the bankrupt's assets. This is only second in importance to securing equality of distribution. The act is filled with provisions for quick and summary disposal of questions arising in the progress of the case, without regard to usual modes of trial attended by some necessary delay. Appeals in some instances must be taken within ten days. * * To prevent this as

much as possible (the estate being wasted in litigation and delay) 'Congress has said to the assignee, You shall commence no suit two years after the cause of action has accrued to you, nor shall you be harassed by suits when the cause of action has accrued more than two years against you. Within that time the estate ought to be nearly settled up and your functions discharged, and we close the door to all litigation not commenced before it has elapsed.' "

The foregoing limitation period in the Act of 1867 for the bringing of a suit by assignees in bankruptcy was also discussed at length by this Court in *Jenkins* v. *International Bank*, 106 U. S. 571.

Section 11e has adopted the two year limitation period contained in the 1841 and 1867 Acts so far as suits to set aside voidable preferences are concerned.

Paraphrasing the foregoing language of the case of *Bailey* v. *Glover*, Congress has said to the trustee by section 11e of the Chandler Act that "in the case of causes of action created by the Bankruptcy Act you shall begin no suit after two years subsequent to the adjudication. Within that time the estate ought to be nearly settled up and your functions discharged and we close the door to all suits on causes of action created by the Bankruptcy Act and not commenced before the expiration of that period."

3. The legislative history of section 11e referred to in the petition for writ of certiorari is summed up on page 19 of the petition in a quotation from 1 Collier on Bankruptcy (14th ed.) sec. 11.13, pp. 1186-1188. Such quotation establishes our contentions (1) that section 11e operates as a statute of limitations on suits brought by a trustee in bankruptcy, and (2) in the event that the *applicable* state statute is longer in duration than the two year period specified in section 11e, that section provides suit may be

brought within such further period of time as the state law may permit. Since under all the authorities no state statute of limitations is applicable to a cause of action created by the Bankruptcy Act, which contains a special statute of limitations there is no applicable state statute which permits further time to bring suit.

Petitioner omits all reference to the following which appears on page 1189 of the same volume of Collier. The omitted portion is as follows:

> * * * "Sec. 11e provides that the period for bringing suit is two years from the *date of adjudication* in bankruptcy unless the federal or state law permits suit at a later period. The date of closing the estate no longer has any significance in this regard; hence a suit by the receiver or trustee ordinarily could not be instituted after two years have elapsed from the date of adjudication, irrespective of the later reopening of the estate. Only where an *applicable* state or federal statute of limitations is of longer duration than the two years specified could such a suit be maintained, and then only within the time remaining under the state or federal law." (Second emphasis supplied)

The foregoing quotation makes clear that section 11e prescribes a two year period from the date of adjudication for the bringing of a suit by a trustee and allows further time only in the event that the cause of action sued on arises under federal non-bankruptcy or state law. We submit that, giving full consideration to the legislative history of section 11e, its plain meaning is that in a case where the cause of action arises under federal non-bankruptcy law if there is a federal statute of limitations it applies, and if the cause of action arises under state law the state statute of limitation applies, but that where the cause of action is

created by the Bankruptcy Act the limitation period of two years prescribed is the only applicable period of limitation.

It is respectfully submitted that the petition should be denied.

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